IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO. 82-1321

KASE HIGA, JUDGE OF THE SECOND CIRCUIT OF HAWAII

Petitioner,

vs.

RORY MAYO,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SCHWEIGERT & ASSOCIATES

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QUESTION PRESENTED FOR REVIEW

1. Whether the Double Jeopardy Clause of the Fifth Amendment bars retrial of a state defendant where the trial court declares sua sponte a mistrial absent any manifest necessity and where the mistrial is caused by the state for its sole benefit.

LIST OF PARTIES AFFECTED

Except for the persons listed in the caption, there are no other parties affected by this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Respondent RORY MAYO, respectfully prays the Petition for a Writ of Certiorari be denied with respect to the decision of the United States Court of Appeals for the Ninth Circuit in the above case.

OPINIONS BELOW

The opinions below are contained in the Petition for Writ of Certiorari (the Court of Appeals' decision herein is reported in 692 F.2d 595 (9th Cir.1982)).

JURISDICTION

The final judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 9, 1982.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fifth Amendment.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Respondent accepts Petitioner's Statement of the Case. However, it must be stated that the deputy prosecutor made no objection to the mistrial and offered no suggestion as to how it might have been avoided. Jeopardy had attached prior to the declaration of mistrial.

EXISTENCE OF JURISDICTION BELOW

The Respondent invoked the jurisdiction of the District Court below by a petition pursuant to 28 U.S.C. § 2254.

REASON FOR DENYING THE WRIT

THE DECISIONS OF THE NINTH CIRCUIT, THE DISTRICT COURT AND JUDGE KASE HIGA OF THE MAUI CIRCUIT COURT CORRECTLY RECOGNIZE THE ABSENCE OF MANIFEST NECESSITY, IN CONNECTION WITH THE TRIAL JUDGE'S DECLARATION OF A MISTRIAL OVER RESPONDENT'S OBJECTION, WHERE THE MISTRIAL WAS CAUSED BY THE STATE FOR ITS SOLE BENEFIT.

The District Court judge applied the so-called "manifest necessity" test to the facts in the instant case and held that no such showing was made in relation to the trial judge's sua sponte declaration of a mistrial over

Respondent's objection. The manifest necessity test was first articulated in United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824), and in Benton v. Maryland, 395 U.S. 784, 793-796 (1969), the double jeopardy clause of the Fifth Amendment was extended to cover state prosecutions such as the case here. And in Arizona v. Washington, 434 U.S. 497 (1978), the United States Supreme Court discussed the test where the defendant did not seek the mistrial as follows:

> . . . Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. Yet in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate "manifest necessity" for any mistrial declared over the objection of defendant. [434 U.S. at 505.]

Can the State then sustain its heavy burden?

To answer this question one must first determine the "cause" of the mistrial in this case. The State argues that Mayo's alleged gift was the factual cause of the mistrial, and that Mayo should not be permitted to benefit from his own misconduct. This assertion just cannot withstand

analysis. A review of the cases shows us that mistrials are caused by (1) acts of or events involving a party, attorney, witness, juror, or judge during the trial, (2) omissions to act or disclose either during trial or immediately before trial by this same class of persons where there is a duty to act or disclose, or (3) a combination of these first two. Acts, events, or omissions to act or disclose days, weeks, or months before trial can never be the legal or proximate cause of a mistrial. Acts, events, or omissions to act or disclose days, weeks, or months before trial only set the stage upon which acts and events during trial and/or omissions to act or disclose during or immediately before trial cause in the legal sense a mistrial.

Applying this concept of "proximate" cause to the instant case one must look at the stage as it was set immediately before trial. Mayo had allegedly offered a gift to the trial judge a month of two before the trial, and the trial judge informed the parties prior to the trial commencing. Was there any duty to act or disclose by any party at this point? The answer is clearly yes if any party wished to disqualify the trial judge for any reason based on the alleged gift. Clearly this was why the trial judge informed the parties - so that a motion for disqualification could be heard. Both parties waived any right to disqualify the trial judge because of the alleged gift by failing to so

move when informed of the allegation. Then came the State's act, during trial after jeopardy attached, of advising the trial judge that the State wished to cross-examine the Respondent concerning the alleged gift. The argument that the State did not raise this matter sooner because it did not know prior to trial that Mayo would testify is totally fallacious for two reasons: (1) it is always foreseeable that a defendant might testify, and (2) if the evidence of the alleged gift was offered to show a guilty state of mind, such evidence would be admissible regardless of whether the defendant testified or not. Thus in this case, the legal or proximate cause of the mistrial was the combination of (1) the State's omission to object immediately before trial to the trial judge sitting and (2) the State's act in announcing during trial after jeopardy attached that it wished to cross-examine the Respondent concerning the alleged gift with the possibility that the judge might be called as a witness.

Secondly, it is helpful to determine who benefited by the mistrial. The State argues that the benefit test of Gori v. United States, 367 U.S. 364, 369 (1961), though subsequently rejected in United States v. Jorn, 400 U.S. 470, 483 (1971), should apply in this case and the retrials upheld because the mistrial was for Mayo's benefit. That test hinges on whether the "mistrial has been granted in the

sole interest of the defendant." This argument that the mistrial was for Mayo's benefit cannot be sustained. All parties agree that the trial judge is not a competent witness at a trial over which he presides. That "benefit" to Mayo always existed and the mistrial in no way altered that fundamental right or rule. The whole purpose of the mistrial was to give the State the opportunity to cross-examine Respondent concerning the alleged gift. No manifest necessity can exist in that situation. Downum v. United States, 372 U.S. 734 (1963); Cornero v. United States, 98 F.2d 69 (9th Cir.1931). This mistrial was solely for the benefit of the State. Thus, applying the test of Gori v. United States, supra, the State's argument collapses as it was the sole beneficiary of the mistrial.

Here the State in effect sought the mistrial to buttress a perceived weakness in its case. The State decided, after jeopardy had attached, that it needed to cross-examine in an additional area in order to make its case. As was said in Arizona v. Washington, supra, in discussing the high degree of manifest necessity for a retrial:

> The question whether that "high degree" has been reached is answered more easily in some kinds of cases than in others. At one extreme are cases in which a prosecutor requests a mistrial in order to buttress weaknesses in his evidence. Although there was a time when English judges served the Stuart monarchs by exercising a power to dis-

charge a jury whenever it appeared that the Crown's evidence would be insufficient to convict, the prohibition against double jeopardy as it evolved in this country was plainly intended to condemn this "abhorent" practice. As this Court noted in United States v. Dinitz, 424 U.S. 600, 611:

> The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad-faith' conduct by judge or prosecutor' . . . threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant.

Thus, the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused. [footnotes omitted.][434 U.S. at 507-708.]

As a matter of law, the State cannot, on these facts, sustain its burden of demonstrating manifest necessity because the mistrial was caused by the State for the benefit of the State. This is the very evil the double jeopardy clause was intended to prevent.

As several alternatives to a mistrial existed, all of which would have obviated the need for a mistrial, no manifest necessity existed for the mistrial. Five alternatives to a mistrial existed in this case. None were considered, and the State as the cause of the situation resulting in the mistrial offered no assistance to the trial judge. That alternatives to a mistrial must be at least considered was laid down in J. Harlan's plurality opinion in United States v. Jorn, supra:

> . . . For the crucial difference between reprosecution after appeal by the defendant and reprosecution after a sua sponte judicial mistrial declaration is that in the first situation the defendant has not been deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal. On the other hand, where the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his 'valued right to have his trial completed by a particular tribunal.' See Wade v. Hunter, 336 U.S. 684, 689 (1949)
>
> If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. Thus, where circumstances develop not attributable to prosecutorial or judicial over-

> reaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error. In the absence of such a motion, the Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. See United States v. Perez, 9 Wheat., at 580.
>
> . . . Yet we cannot evolve rules based on the source of the particular problem giving rise to a question whether a mistrial should or should not be declared, because, even in circumstances where the problem reflects error on the part of one counsel or the other, the trial judge must still take care to assure himself that the situation warrants action on his part foreclosing the defendant from a potentially favorable judgment by the tribunal.
>
> . . . Yet, in the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate. [400 U.S. at 484-486.]

This requirement that all alternatives short of mistrial must be explored was discussed in United States v.

Grasso, 552 F.2d 46 (2nd Cir.1977), reh. den. 568 F.2d 899, vacated on other grounds 438 U.S. 901 (1978), and found to be the holding of Jorn (552 F.2d at 52, n. 2). Dunkerly v. Hogan, 579 F.2d 141 (2nd Cir.1978). And in Illinois v. Somerville, 410 U.S. 458 (1973), the United States Supreme Court stated:

> The determination by the trial court to abort a criminal proceeding where jeopardy has attached is not one to be lightly undertaken, since the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one. United States v. Jorn, supra. Nor will the lack of demonstrable additional prejudice preclude the defendant's invocation of the double jeopardy bar in the absence of some important countervailing interest of proper judicial administration. . . . [410 U.S. at 458.]

United States v. Pierce, 593 F.2d 415, 419 (1st Cir.1979).

Let us now look at these five alternatives:

1. The trial judge should have determined that the State waived its right to call him as a witness by failing to move to disqualify him when notified prior to trial of the alleged gift.

The basis for the State's argument that manifest necessity existed was the possibility that the trial judge might be called as an impeachment witness against Mayo when he testified. The nature of the evidence the trial judge would have given related to the alleged gift to him from Mayo. The question that must be asked is why there was

manifest necessity for a mistrial when the State was fully aware of the alleged gift prior to jeopardy attaching and no objection was made to the trial judge sitting? As the United States Supreme Court said in Wade v. Hunter, 336 U.S. 684 (1949):

> . . . There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such an event the purpose of the law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again. . . . [emphasis added.] [336 U.S. at 689.]

What was unforeseeable at Petitioner's trial? The answer is nothing! It is always foreseeable that a defendant might testify. Notwithstanding this, as well as the fact that the trial judge expressly raised the matter of the alleged gift in a pretrial conference, the deputy prosecutor remained silent until jeopardy attached before stating that the State wanted the trial judge as a State witness. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458 (1938). The deputy prosecutor had to know why the trial judge raised this matter, and he waived any objection the State might have to the trial judge sitting. This case is very much like Downum v. United States, supra, where the United States Supreme Court held that there was no

manifest necessity where the prosecutor allowed the jury to be selected and sworn even though one of its key witnesses was absent and had not been found. In the instant case, the Judge's disqualification is tantamount to absence. As a matter of law, manifest necessity cannot be found on these facts.

2. The trial judge could have requested that another judge rule on the admissibility of the evidence.

Had this been done and a ruling excluding the evidence obtained, the need for a mistrial would have been obviated. In fact, Mayo's counsel argued the inadmissibility of this evidence at the in-chambers conference before the mistrial was declared. The District Court below found that the evidence of the alleged gift was inadmissible in any circumstance as it had no bearing on Mayo's truth and veracity citing Rule 608 of the Hawaii Rules of Evidence, a codification of the common law applicable at the time of Mayo's first trial.[1] The suggestion that a gift of some lobster tails to a judge suggests a guilty state of mind is weak at best. At Mayo's third trial his motion in limine to exclude this evidence as being more prejudicial than probative was granted. This evidence was just not admissible in

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1. 528 F.Supp. at 836-838.

any case, and as such there was no reason for a mistrial.

3. The trial judge could have asked another judge to take over the trial.

As the District Court held:

> Rule 25(a) of the Hawaii Rules of Penal Procedure, in effect at the time of Petitioner's trial, provides that, "[i]f by reason of . . . disqualification, the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial." Thus, it appears that Judge Fukuoka might simply have transferred the trial to another judge without having had to terminate the one before him. Such a procedure would have both effectively prevented any possible taint arising from the Petitioner's attempted gift and also would have made a mistrial unnecessary. [528 F.Supp. at 838.]

The State relies on United States v. Lynch, 194 U.S.App.D.C. 213, 598 F.2d 132 (1978), as authority that a failure to resort to Rule 25 does not vitiate a finding of manifest necessity. This reliance is misplaced because in Lynch the other trial judges were requested to take over, but all stated they would be unable because of their own calendars. Further, already in that case numerous documents had been offered in evidence, 43 witnesses had been called, and any further delay even for a new judge to take over the

trial would have worked a hardship on the jury. Contrast that situation with the instant case where the trial had gone only one day and the other trial judge for the local circuit was present at the in-chambers hearing when the mistrial was declared.

4. The trial judge could have inquired whether Mayo would admit the incident in question.

Had the trial court made such an inquiry and Mayo admitted the circumstances of this alleged gift, there would have been no need for the trial judge or any other witness concerning the matter. Like the other alternatives, this was not considered.

5. The trial judge could have recessed the trial to seek a suitable alternative short of mistrial.

Had this been done, the Court and all parties would have had time to reflect on the problem and find an alternative to a mistrial. In United States v. Lynch, supra, this was done, and a mistrial was declared only after several weeks had passed without a suitable alternative to a mistrial being found. And in Dunkerly v. Hogan, 579 F.2d 141, 147-148 (2nd Cir.1978), a failure to consider this alternative precluded any finding of manifest necessity. Clearly, if the trial in the instant case had been recessed,

there would have been no mistrial.

Considering all of these alternatives, how then can it possibly be said that there was manifest necessity for a mistrial? The instant case is similar to United States v. Jorn, supra, where the United States Supreme Court said:

> . . . It is apparent from the record that no consideration was given to the possibility of a trial continuance; indeed, the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so. When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of this mistrial. . . .[400 U.S. at 487.]

As in United States v. Starling, 571 F.2d 934, 941 (5th Cir.1978), the instant case ". . . reflects a total lack of awareness of the double jeopardy consequences of the court's action and of the manifest necessity standard," and, likewise, there was a crucial failure to consider Mayo's protected interest in having the trial concluded in a single proceeding.

This interest of a defendant was fully explored in Dunkerly v. Hogan, supra, where the availability of a rea-

sonable alternative (a brief continuance) to mistrial vitiated the finding of manifest necessity. There the Second Circuit said:

> . . . In the absence of any record evidence or statement by the court indicating why a short continuance would have been unreasonable, unfair, or impractical, we decline to speculate as to factors that the trial judge might possibly have considered, such as the 'freshness' of the evidence. On this record the declaration of a mistrial cannot properly be sustained, over appellant's objection, as having been required by a "high degree" of necessity.[footnote omitted.][579 F.2d at 148.]

United States v. Grasso, supra at 53.

In the instant case more than one alternative existed which would have been reasonable, fair, and practical. Nowhere from the record can it be inferred that the trial judge considered any of them,[2] and the State was just

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2. The State argues that the trial judge did not abuse his discretion sua sponte in granting a mistrial over defense objection. While it is true that many cases speak in terms of abuse of discretion as the standard of review on appeal, strictly speaking this is only true where a motion for mistrial is denied. United States v. Thomas, 632 F.2d 837, 841-844 (10th Cir. 1980). Where a mistrial is granted and then a motion to dismiss on the ground of double jeopardy is either granted or denied, the court on appeal is reviewing the propriety of that second ruling and the question is whether there was an error of law. Holiday v. Johnston, 313 U.S. 342 (1941). Where, as in the instant case, there is an appeal from the granting of a writ of habeas corpus, the standard of review is whether the decision of the District Court was "clearly erroneous." Stone v. Cardwell, 620 F.2d 212 (9th Cir.1980); Greenfield v. Gunn, 556 F.2d 935, 938 (9th

not interested. Now the State claims the right to a mistrial and retrial wherever it is known prior to trial that the judge is a potential State witness, but the defendant does not object to the judge sitting. Thus, the State can try its case once for free, and then turn around and do it again for real. This is exactly what the double jeopardy clause was intended to prevent.

CONCLUSION

This is a blatant case of the absence of manifest necessity for a mistrial. The double jeopardy clause is too important to be cast aside as easily as the Supreme Court of Hawaii did. The Petition for Writ of Certiorari by the

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Cir.1977). And here, where there is no factual dispute and the question is the application of the manifest necessity doctrine, purely a question of law, the rule in Sumner v. Mata, 449 U.S. 539 (1981), has no application. It is to be noted that the Hawaii Supreme Court erroneously applied the wrong standard to an error of law issue.

It is better to discard the "abuse of discretion" language because of the confusion it can cause and use the language of Arizona v. Washington, supra at 510, 514, that the trial judge's decision should be accorded great deference. The instant case is somewhat unusual in that the other local circuit judge, Judge Higa, who was present at the in-chambers conference in which the trial judge sua sponte declared a mistrial, was the judge who granted the motion to dismiss on the ground of double jeopardy. Clearly, if great deference must be given, it must be given to the decisions of both judges.

State is clearly without merit and must be denied.

DATED: Honolulu, Hawaii, April 25, 1983.

EARLE A. PARTINGTON
Attorney for Respondent

PROOF OF MAILING - AFFIDAVIT BY BAR MEMBER

I, Earle A. Partington, attorney for RORY MAYO, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 25th day of April, 1983, I deposited in a United States post office located in Honolulu, Hawaii, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

EARLE A. PARTINGTON
Attorney for Respondent

Subscribed and sworn to before me
this 25th day of April, 1983.

NOTARY PUBLIC, State of Hawaii

My Commission Expires: 3/4/85

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO. 82-1321

KASE HIGA, JUDGE OF THE SECOND CIRCUIT OF HAWAII

Petitioner,

vs.

RORY MAYO,

Respondent.

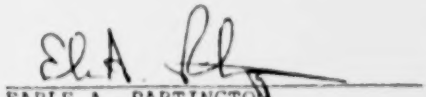
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, RORY MAYO, pursuant to Rule 46 of this Court and 18 U.S.C. §3006A(d)(6), asks leave to file the attached Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Respondent was represented by appointed counsel in the

Circuit Court and on appeal to the United States Court of Appeals for the Ninth Circuit.

DATED: Honolulu, Hawaii, April 25, 1983.

Respectfully submitted,



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